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No. 73-229

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

MARSHALL P. SAFIR, PETITIONER

v.

ROBERT W. BLACKWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN EXPORT LINES, INC.; LYKES BROS. STEAMSHIP CO., INC.; MOORE-McCORMACK LINES, INCORPORATED; AND UNITED STATES LINES, INC.

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OPINIONS BELOW

The Court of Appeals did not render an opinion; its order of May 16, 1973 denying petitioner's "motion to recall mandate" (App. 1a)[1] is not reported. There is no district court opinion, petitioner having sought judicial

[1] "App." refers to the separately bound appendix which accompanied the petition for certiorari.

review directly in the court of appeals. The opinion of the Maritime Subsidy Board, U.S. Department of Commerce (App. 15a), is reported at 13 Pike & Fischer Shipping Regulation Reports ("SRR") 809 (April 16, 1973).[2]

JURISDICTION

The order of the court of appeals was entered on May 16, 1973. The petition for a writ of certiorari was filed on August 2, 1973. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1970).

STATUTE INVOLVED

Section 810 of the Merchant Marine Act, 1936, 46 U.S.C. §1227 (1970), provides:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI or for any charterer of vessels under title VII of this Act, to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

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[2]Other aspects of this litigation have been reported in Safir v. Gulick, 297 F. Supp. 630 (E.D.N.Y.). rev'd, *sub nom.* Safir v. Gibson, 417 F.2d 972 (2nd Cir. 1969); Safir v. Gibson, 432 F.2d 137 (2nd Cir.), certiorari denied, 400 U.S. 850 (1970); Safir v. Gibson, 330 F. Supp. 225 (E.D.N.Y. 1971); and Safir v. Blackwell, 469 F.2d 1061 (2nd Cir. 1972).

> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

QUESTIONS PRESENTED

1. Whether, in the absence of a statute conferring jurisdiction on the courts of appeals to review Maritime Subsidy Board decisions directly, the United States Court of Appeals for the Second Circuit was the proper court of first instance to review a decision of that Board.

2. If the answer to the first question is yes, whether a Maritime Subsidy Board decision which is not final was ripe for judicial review.

STATEMENT

This matter stems from an investigation by respondents Blackwell, *et al.*, acting as the Maritime Subsidy Board in the Department of Commerce,[3] to determine

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[3]Congress initially vested responsibility for administration of the Merchant Marine Act, 1936, in the United States Maritime Commission. Reorganization Plan No. 21 of 1950 (64 Stat. 1273, 15 Fed. Reg. 3178 (1950)) transferred the Commission's functions to the Federal Maritime Board and the Maritime Administration, Department of Commerce. Reorganization Plan No. 7 of 1961 (75 Stat. 840, 26 Fed. Reg. 7315 (1961)) transferred these functions

whether steamship companies receiving "operating-differential subsidies" under the Merchant Marine Act, 1936,[4] violated Section 810 of that Act.[5] Section 810 forbids subsidized operators from being party to agreements or engaging in practices with other ocean common carriers which are "unjustly discriminatory or unfair" to other American-flag steamship operators. The penalty for such conduct may be the forfeiture of subsidy.[6]

The investigation, known as Docket No. S-243, focused on tariff rate reductions by the Atlantic and Gulf American-Flag Operators ("AGAFBO"), a conference of nineteen subsidized and unsubsidized steamship com-

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to the Secretary of Commerce, who subdelegated them in part to the Maritime Administration and in part to an *ex officio* Maritime Subsidy Board within that Administration. Department of Commerce Order No. 117 (26 Fed. Reg. 7713 (1961)), as amended, Department of Commerce Organization Order No. 10-8 (37 Fed. Reg. 15179 (1972)). (The 1961 reorganization also created a Federal Maritime Commission and gave it functions not here relevant.)

[4] 46 U.S.C. §§1101 *et seq.* (1970). In substance, Title VI of the 1936 Act, 46 U.S.C. §§1171-1183, authorizes the government to contract with American Steamship Lines to provide regular shipping services for a 20-year period over essential U.S. foreign trade routes with modern American ships manned by American crews; in exchange the lines are paid the difference between their operating costs using those American vessels and American crews and the lower operating costs of their foreign-flag competitors, *i.e.*, the "operating-differential." See *Moore-McCormack Lines, Inc. v. United States*, 188 Ct. Cl. 644, 650, 413 F.2d 568, 571 (1969); *Pacific Far East Line, Inc. v. United States*, 184 Ct. Cl. 169, 394 F.2d 990 (1968).

[5] 46 U.S.C. §1227 (1970).

[6] Section 810 also gives the injured operator a treble damage remedy patterned after the antitrust laws. This is not involved in this case.

panies whose membership included the four respondents joining in this brief, American Export Lines, Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines, Incorporated, and United States Lines, Inc. For eleven months in 1965-1966, AGAFBO had reduced its rates for the transportation of military cargo and military household goods to match those offered by Sapphire Steamship Lines, Inc., a non-conference American-flag operator. The issue before the Board was whether the subsidized carriers' participation in that rate reduction violated Section 810 of the 1936 Act and, if so, whether penalties should be imposed therefor. Petitioner, an officer and stockholder of Sapphire, these four respondents, and other steamship companies were parties to that administrative proceeding (App. 16a).

The Board issued a preliminary decision on April 16, 1973, concluding that the subsidized companies had violated Section 810. (App. 15a-87a).[7] It determined, however, that only the lines which competed with Sapphire for cargo at the reduced rates—the so-called "trade" lines (including these respondents)—should be penalized by repaying portions of the subsidy they received during the period in question, the precise amounts to be calculated under a formula based on the volume of military cargo carried at the reduced rates. The sums subject to repayment under that formula were substantial (App. 86a-87a), and the Board afforded respondents opportunity to review the basis of its preliminary determinations (App. 87a):

> Trade respondents, and Public Counsel as he deems necessary, are to submit on or before May 16,

[7] The Board's decision was based on a record developed in a proceeding before one of its administrative law judges. See App. 18a-19a.

> 1973, their views and supporting documentation on the exact [operating-differential subsidy] amounts recoverable for violation of Section 810 consistent with the decision herein. Any replies to such submissions are to be filed within ten days after service of such submissions. An order determining final recoveries will thereafter be issued. *Upon issuance of said order on final recoveries this decision will become final.* [Emphasis added.]

Eleven days later on April 27, 1973, without awaiting a final Board decision, petitioner *pro se* filed a "motion" in the Second Circuit to overturn the Board's action and require the imposition of greater sanctions on all respondents. Respondents moved to dismiss that "motion" on the ground that it was outside the court of appeals' jurisdiction and premature. The court denied petitioner the relief requested on May 16, 1973 (App. 1a). The petition for a writ of certiorari seeks review of that denial.[8]

ARGUMENT

The court of appeals declined to entertain petitioner's request to review a preliminary decision of the Maritime Subsidy Board. The court's ruling is correct and consistent with decisions of this Court and other circuits; further review is therefore not warranted.

1. Petitioner sought judicial review of a Maritime Subsidy Board decision directly in the Second Circuit.

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[8] While not named in the petition for certiorari as respondents, the four steamship companies joining in this brief were parties to the underlying administrative proceeding and appeared to opposed petitioner's "motion" in the court whose judgment is sought to be reviewed. They are therefore proper parties in this Court under its Rule 21(4).

The jurisdiction of the court of appeals, however, is limited to that conferred by Congress; no statute authorizes that court to entertain such an action as an original matter and petitioner has cited none. The court of appeals, like this Court, "does not normally review orders of administrative agencies in the first instance." *C.A.B. v. American Air Transport*, 344 U.S. 4 (1952); *Arizona Department of Public Works v. H.E.W.*, 449 F.2d 456, 464 (9th Cir.), certiorari denied, 405 U.S. 919 (1971); *Robertson v. F.T.C.*, 415 F.2d 49, 54-55 (4th Cir. 1969); *Rettinger v. F.T.C.*, 392 F.2d 454, 456-457 (2d Cir. 1968); *Schwab v. Quesada*, 284 F.2d 140, 143 (3d Cir. 1960); *City of Dallas, Texas v. Rentzel*, 172 F.2d 122, 123 (5th Cir.), certiorari denied, 333 U.S. 858 (1949).

The court below therefore correctly declined to hear petitioner's cause at this time. While Subsidy Board decisions are not immune from judicial scrutiny, one seeking that review must follow the prescribed channels. These begin in the district court or the Court of Claims. See, *States Steamship Co. v. United States*, 192 Ct. Cl. 795, 482 F.2d 832 (1970); *Sea-Land Service, Inc. v. Connor*, 418 F.2d 1142 (D.C. Cir. 1969); *Pacific Far East Line, Inc. v. United States*, 184 Ct. Cl. 169, 394 F.2d 990 (1968); *Oceanic Steamship Co. v. United States*, 165 Ct. Cl. 217 (1964); *American President Lines v. Federal Maritime Board*, 133 F. Supp. 100 (D. D.C. 1955), *affirmed*, 235 F.2d 18 (D.C. Cir. 1956); *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346 (D. D.C. 1953).

It is relevant at this point to note that petitioner is proceeding here *pro se*. On other occasions, when assisted by counsel, he has successfully obtained relief against the Board in suits initiated in the district court. See, *Safir v. Gulick*, 297 F. Supp. 630 (E.D.N.Y.), reversed *sub nom.*

Safir v. Gibson, 417 F.2d 972 (2d Cir. 1969); *Safir v. Gibson*, 432 F.2d 137 (2d Cir.), certiorari denied, 400 U.S. 850 (1970); and *Safir v. Gibson*, 330 F. Supp. 225 (E.D.N.Y. 1971).

2. An equally sound reason for the lower court's refusal to consider petitioner's "motion" is the interlocutory nature of the agency's action. Not only did the Board expressly state that its decision was not final, but it required the parties to submit evidence bearing on the computation of penalties in accordance with its preliminary decision. (See pp. 5-6, *ante*). This was no mere formality. Three respondents have submitted such evidence, which Public (government) Counsel has accepted, indicating that the subsidies subject to recovery were substantially overstated in the Board's preliminary decision. Should the Board agree, its final decision will differ significantly from the initial one. In addition, respondents are entitled to petition the Secretary of Commerce to review the Board's ultimate action and in all likelihood will do so. 46 C.F.R. §202.1 (1972 Rev.).

Section 10 of the Administrative Procedure Act contemplates judicial review only after "final agency action". 5 U.S.C. §703 (1970). This Court has held that "the relevant considerations in determining finality are whether the process of administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Boston Marine Terminal Assoc. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970), and cases there cited. The Maritime Subsidy Board decision here involved is not "final" under that test. It does not affect any party's rights or obligations, no legal consequences flow from it, and judicial review at this stage would interrupt the Board in

the midst of preparing its final decision, which is expected imminently. Whatever limits there may be on the "finality" doctrine as applied to administrative agencies, the absence of a formalized administrative decision with concrete effect makes plain that this case is not "ripe" for judicial review. The court below therefore correctly refrained from judicial interference at this premature stage of the administrative process. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); *Toilet Goods Association v. Gardner*, 387 U.S. 158, 162-165 (1967); *Sea-Land Service, Inc. v. Federal Maritime Commission*, 402 F.2d 631 (D.C. Cir. 1968).

3. Given the posture of the case, petitioner's substantive contentions are not material. Moreover, the court below has reviewed other aspects of this litigation on three previous occasions. It is therefore fair to state that its denial of relief was made in the context of a judicial appreciation of the issues in and status of the underlying administrative proceeding. See App. 142a, 152a, and 163a.[9]

~~proceeding. See App. 142a, 152a, and 163a~~.

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[9]Petitioner is mistaken in suggesting that the decision below conflicts with *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970). That case did not involve the Merchant Marine Act, 1936, and the cited quotations from the Court's opinion (Pet. 6) address a claim of immunity from judicial review, an issue not present in this case. See page 7, *ante*.

CONCLUSION

For the reasons stated the petition for certiorari should be denied.

Respectfully submitted,

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